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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor, *Petitioner*,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF.

CLARENCE W. DEKNIGHT,
601 Hibbs Building,
Washington, D. C.

FREDERICK SCHWERTNER,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue.

Motion of Clarence W. DeKnight, a Member of the Bar of this Court, for Leave to File Brief as Amicus Curiae.

Now comes Clarence W. DeKnight, a member of the bar of this Court, as amicus curiae, and moves that leave be granted to file the brief submitted herewith, in the case of *Leach, Executor, v. Nichols, Collector,* reported in 50 F. (2d) 787, certiorari granted December 7, 1931.

The issue raised in the case at bar as to the deductibility of the Massachusetts inheritance tax from the value of the gross estate in arriving at the net estate subject to the Federal estate tax under the Revenue Act of 1916, as amended, is similar to an

issue presented in the case of *Barnim Kombst, et al., v. United States,* decided by the Court of Claims on November 2, 1931, and in which the Government will file an application for a writ of certiorari. In *United States v. Barnim Kombst, et al., supra,* the Court of Claims held that the California inheritance tax was deductible for Federal estate tax purposes under the Revenue Act of 1916, as amended, while in *Leach v. Nichols, supra,* it was held that the Massachusetts inheritance tax was not deductible. The said Clarence W. DeKnight appears as counsel for the plaintiffs in *Barnim Kombst, et al., v. United States.* The decision of this Court in *Leach v. Nichols* will affect and may be decisive of an issue presented in *Barnim Kombst, et al., v. United States.*

Wherefore, said Clarence W. DeKnight prays that he may have leave to file a brief as amicus curiae, a copy of which is herewith presented.

CLARENCE W. DEKNIGHT,
A Member of the Bar of this Court.

Dated at Washington, D. C., January 30, 1932.

To Counsel for Petitioner and Respondent:

GENTLEMEN:

Take notice that on Monday, February 15, 1932, I will submit the foregoing motion to the Supreme Court of the United States.

CLARENCE W. DEKNIGHT,
601 Hibbs Building,
Washington, D. C.

February 1, 1932.

SERVICE OF MOTION AND NOTICE.

A copy of said motion and notice have been served on counsel for petitioner and respondent.

CLARENCE W. DEKNIGHT.

Washington, D. C., February 15, 1932.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor, *Petitioner*,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue.

BRIEF AS AMICUS CURIAE.

The decision of the Circuit Court of Appeals, First Circuit, in *Nichols v. Leach*, 50 F. (2d) 787, holding that the Massachusetts inheritance tax is not deductible as a charge against the estate under Section 203 (a) (1) of the Revenue Act of 1916 in arriving at the value of the net estate subject to the Federal estate tax, is in direct conflict with the decision of the Court of Claims in *Merrill, et al., v. United States*, 66 Ct. Cls. 136, holding that the Massachusetts inheritance tax is deductible under that act, and also does violence to the decisions of this Court in *Keith v. Johnson*, 271 U. S. 1, and *United States v Mitchell*, 271 U. S. 9,

holding respectively that the New York transfer tax and the Texas inheritance tax are deductible items under the Revenue Act of 1916.

It is evident that this Court in *Keith v. Johnson* and *United States v. Mitchell, supra,* gave the subject of the deductibility of State inheritance taxes under the Revenue Act of 1916 the most careful and deliberate thought, and no reason exists at the present time for the Court to depart from the judicial pronouncements contained therein.

The decisions of the various State courts describing the inheritance tax are not very helpful in determining whether the tax is a charge against the estate, unless they specifically decide this question. The terms of the inheritance tax act should be examined to determine whether the tax is a charge against the estate.

As was well said by the late Judge Moss in *Merrill, et al., v. United States, supra*:

> "The primary question is not whether the tax under discussion is a tax upon the right to transmit property or upon the right to receive property. It is simply whether or not this tax is such a charge as falls within the term 'such other charges against the estate, as are allowed by the laws of the jurisdiction under which the estate is being administered'."

In *Lederer v. Northern Trust Co., et al.,* 262 Fed. 52, certiorari denied, 253 U. S. 487, allowing the deduction of the Pennsylvania inheritance tax under the Revenue Act of 1916, it is stated:

> "* * * But in looking for the nature of the collateral inheritance tax under consideration, it

is not necessary to seek light from statutes and decisions of other states, for the act shows its nature by its own clear expressions aided by interpretations repeatedly made by the Supreme Court of Pennsylvania.

"The act provides that 'all estates * * * shall be subject' to the tax; that executors and administrators shall pay the tax; that until they pay it they shall not be discharged; that the Auditor General's receipt for its payment shall be a proper voucher in the settlement of the estate; and that in stating an account in the Orphans' Court the tax shall be allowed and deducted before a balance for distribution is struck."

There is no question but that a decision of a State court deciding whether or not a certain inheritance tax is a charge against an estate is entitled to great weight. But when a State court upholds the constitutionality of an inheritance tax act by stating that the tax is one on the right to transmit property, or on the right to receive property, or on both the right to transmit and receive property, such a decision affords little light in the judicial determination of whether the tax is a charge against the estate. The State reports are replete with decisions containing expressions descriptive of inheritance taxes, but such decisions are worthless unless the cases involved a controversy as to whether the tax is a charge against the estate, or involved a question closely approaching such an issue.

It is apparent that the Circuit Court of Appeals in *Nichols v. Leach, supra,* largely relied upon the decision of the Court of Appeals of New York in the *Matter of Oakes,* 248 N. Y. 280, in reaching the conclusion that it did, but in view of the facts in that

case, its conclusion was wholly unwarranted and the case is not authority for the issue involved in the case at bar. The *Matter of Oakes, supra*, involved the issue as to whether the estate or the donee was liable for the Federal estate tax on certain shares or stock. Francis J. Oakes, the owner of 1,510 shares of stock of the Oakes Manufacturing Company, made delivery of his certificates to be held in escrow for the benefit of his son. Delivery was accompanied by a writing which described the conditions of the escrow as follows:

> "I, Francis J. Oakes, hereby deliver irrevocably the certificates of stock of the Oakes Manufacturing Company, owned by me for 1,510 shares of the stock of said company, to John D. Kernan and Archibald R. Watson in escrow, to be delivered by them or the survivor of them upon my death to my son Francis J. Oakes, Jr., subject to all state and national taxes thereon being paid, and said Kernan and Watson, or the survivor of them, being fully indemnified and protected against the same."

The clause as to the taxes was inserted in the escrow upon the suggestion of one of the trustees that without it they might become involved in personal liability.

Upon the death of Oakes, Sr., the executor, Francis J. Oakes, Jr., paid out of his own moneys the tax assessed upon the transfer of the shares under the statutes of New York.

As was stated by Chief Justice Cardozo:

> "The question to be determined here is the incidence of the Federal tax as between the donee of the shares, who was also the executor, upon

the one hand, and the legatees of the residuary estate, upon the other. There can be no doubt that the executor was justified in discharging the tax out of the residue unless the incidence of the burden has been changed by the conditions of the escrow. The surrogate (disapproving the report of a referee to the contrary) and the Appellate Division found that such a change had been wrought, and that the donee by the acceptance of the gift had assumed by implication the payment of the tax in exoneration of the residue. We hold a different view."

The Court held that by the acceptance of the shares of stock the donee did not thereby assume the payment of the Federal estate taxes thereon, and that the conditions stated in the escrow agreement were not obligations laid on the donee, but were conditions of the escrow imposed on the trustees.

It is a far cry to say that this decision changes the complexion of the New York transfer tax, and will now enable this Court to depart from the rule announced in *Keith v. Johnson* and *United States v. Mitchell, supra.*

The decision in the *Matter of Oakes, supra,* does not purport to overrule *Home Trust Co. v. Law,* 204 App. Div. 590, 198 N. Y. Supp. 710, which is an authority directly in point, and *Re Hubbard,* 234 N. Y. 179, 137 N. E. 17, which were dealt with at length and relied upon by this Court in *Keith v. Johnson, supra.*

In *Keith v. Johnson, supra,* in considering the case of *Home Trust Co. v. Law, supra,* which is an authority entitled to great weight, Mr. Justice Butler, who delivered the opinion of the Court, said:

"By indicating that the latest decisions of the State courts will be followed here as binding, it is

> not intended to intimate that a different view is entertained as to the construction properly to be given the state law. *In fact we agree with that construction;* and feel justified in so saying as the same question arises in another case—No. 470, the opinion in which is announced concurrently with this one—on a substantially similar statute of a state where there has been no authoritative construction by the state courts. * * *." (Italics ours.)

In *United States v. Mitchell,* 271 U. S. 9, decided concurrently with *Keith v. Johnson, supra,* holding the Texas inheritance tax deductible under the Revenue Act of 1916, it is stated:

> "We are of the opinion that, in respect of the matter under consideration, the Texas inheritance tax law cannot be distinguished from the new York transfer tax law. * * *."

This decision paved the way for uniform decisions on the question involved where the State inheritance tax acts are substantially the same.

The Court of Claims in *Barnim Kombst, et al., v. United States, supra,* stated that they could see no difference between the California inheritance tax act and those involved in *Keith v. Johnson, supra, United States v. Mitchell, supra,* and *Merrill v. United States, supra.* The Courts of California have described the inheritance tax by various terms. The latest expression of the Supreme Court of California is contained in *Estate of Letchworth,* 201 Cal. 1, decided April 2, 1927, wherein it was said "the tax imposed by the inheritance tax statute is on the transfer of the property or on the right to succeed to the property rather than on the property itself."

Under the law of California the tax is not measured by the value of the property which the person actually receives. It becomes fixed as of the date of death and a certain portion of the property is contributed to the State. It was so held in the *Estate of Hite,* 159 Cal. 392, which is an authority entitled to weight. This case involved an appeal from an order fixing the amount of inheritance tax due under the Inheritance Tax Act (Stats. 1905, p, 341) from the various beneficiaries under the will of deceased. The appeal was by the residuary legatees and by the administrator with the will annexed. The lower court in fixing the amount of inheritance tax included in the valuation of the estate upon which the tax should be computed the sum of $98,991.10 left by the deceased, which had never come into the possession of the administrator with the will annexed, but which had been appropriated to his own use within a year of his appointment by the executor of the will of deceased. The whole of said sum of $98,991.10 was lost to the estate as the executor was without bond. The sole question in the case was whether the lower court's action in including the sum of $98,991.10 in the estate subject to tax was correct. The Court held that the amount was properly included. The Court, in the course of its opinion, said:

> "The exact question thus presented has apparently never before arisen in this or any other state. * * *
>
> "* * * We can perceive no warrant in the Inheritance Tax Act for holding that the destruction or loss of a part of the property before the actual delivery of possession to the beneficiary can affect the question of amount of tax, any more than

would a material depreciation in its value affect it. * * * The residuary legatees here are seeking to take under the will of deceased all the residue of his property after the payment of debts, expenses of administration, and other legacies. We have here no question of the effect of a renunciation of a legacy. The residuary legatees are enforcing the provisions of the will in their favor. Under that will the residue of the estate vested in them at the instant of death of their testator, and the amount of succession tax which they are required to pay must be determined upon the conditions existing at that time. * * *

"We see no force in the claim of the administrator with the will annexed that it cannot deduct the tax so far as the $98,491.10 is concerned from the other property in its hands which constitutes part of the residuum of the estate and belongs under the provisions of the will to the residuary legatees. The residuary legatees are bound to pay as a condition to receiving possession of the resdue of the estate, a succession tax determined on the basis hereinbefore stated, and the administrator is expressly authorized and obligated to deduct the whole tax of any such legatee from the property in its possession belonging to him under the residuary clause of the will."

This decision demonstrates that under the law of California the inheritance tax is not one on a legatee on the value of property which he actually and physically receives on distribution, but one which attaches at the instant of death of the decedent, and is based on the value of the property at that time. The case actually decides that the tax is a charge against the estate, because if the executor had absconded with all the decedent's property excepting enough to pay the inheritance tax no different rule would apply.

In *Barnim Kombst, et al., v. United States, supra,* the decedent's heirs and residuary legatees were German alien enemies resident in Germany. The decedent was an alien enemy resident in California, and she died on April 25, 1917. All the right, title and interest of the alien enemy heirs in and to the estate was seized by the Alien Property Custodian on April 18, 1918. The California inheritance tax was paid by the executors of the estate based on the entire net value of the estate at the time of the death of the decedent.

In conclusion, it is respectfully submitted that no reason exists why this Court in *Leach v. Nichols* should depart from the rule heretofore announced in *Keith v. Johnson, supra,* and *United States v. Mitchell, supra.*

Respectfully submitted,

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Washington, D. C., February 15, 1932.